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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. VICTOR HUGO RENDON-LARA, Defendant(s).	Criminal Case No. 08CR1367-JLS DATE: August 15, 2008 TIME: 1:30 p.m. Before Honorable Janis L. Sammartino UNITED STATES' STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

I

STATEMENT OF THE CASE

The Defendant, Victor Hugo Rendon-Lara (hereinafter "Defendant"), was charged by a grand jury on April 30, 2008 with violating 18 U.S.C. § 545, importation of merchandise subject to seizure. Defendant was arraigned on the Indictment on May 1, 2008, and entered a plea of not guilty.

II

STATEMENT OF FACTS

Defendant was apprehended on the evening of April 3, 2008, by United States Customs and Border Protection ("CBP") Officers at the San Ysidro, California Port of Entry. There, Defendant

entered the vehicle inspection lanes as the driver, registered owner, and sole occupant of a 1997 Chevrolet Suburban ("the vehicle").

At primary inspection, a CBP Officer asked Defendant what he was bringing from Mexico. Defendant responded that he was bringing back soda and chips. The CBP Officer inspected the rear of the vehicle and discovered two large cylindrical carton containers without labels. Upon being asked what these items were, Defendant replied that the containers held grease used to clean semi trucks and that he had purchased the items in the U.S. The CBP Officer discovered that the containers were extremely heavy for the size of the containers. Upon probing the containers, the CBP Officer suspected the containers contained iodine. He then escorted Defendant to the security office and the vehicle was turned over to the vehicle secondary lot for further inspection.

There, upon further inspection of the vehicle, the two containers containing suspected iodine were removed from the vehicle. Officials from a contract environmental services company determined that the containers did indeed contain iodine. The containers had a combined weight of approximately 102.85 kilograms.

III

MEMORANDUM OF POINTS AND AUTHORITIES

A. THE GRAND JURY INSTRUCTIONS WERE NOT FAULTY, AND THE INDICTMENT SHOULD NOT BE DISMISSED

Defendant moves to dismiss the indictment against him for alleged errors in the instructions given to the indicting grand jury during its impanelment by the Honorable Larry A. Burns on January 10, 2007. The United States explicitly incorporates by reference its extensive briefing on this issue submitted in United States v. Martinez-Covarrubias, 07CR0491-BTM, United States v. Renovato, 07CR3413-BEN, United States v. Barron-Galvan, 07CR3469-H, and United States v. Villaescusa, 08cr0255-JLS. These related motions have been denied by each and every court in this district that has considered them, including this Court, and should also be denied in this case.

The United States would be happy to supplement its response and opposition to these motions at the Court's request.

B. DEFENDANT'S MOTION TO PRODUCE GRAND JURY TRANSCRIPTS SHOULD BE DENIED

Defendant moves for production of the grand jury transcripts in the proceedings leading to his indictment. This request must be denied, since Defendant does not support the request with any showing remotely approaching the level of necessity required to invade the sanctity of the grand jury's deliberations.

The need for grand jury secrecy remains paramount unless the defendant can show "a particularized need" that outweighs the policy of grand jury secrecy. United States v. Walczak, 783 F.2d 852, 857 (9th Cir. 1986); United States v. Murray, 751 F.2d 1528, 1533 (9th Cir. 1985). Furthermore, it is well settled that the grand jury may indict someone based on inadmissible evidence or evidence obtained in violation of the rights of the accused. See United States v. Mandujano, 425 U.S. 564 (1976) (indictment brought based on evidence obtained in violation of defendant's right against self-incrimination); United States v. Calandra, 414 U.S. 338, 343 (1974); United States v. Blue, 384 U.S. 251 (1966) (indictment brought based on evidence obtained in violation of defendant's right against self-incrimination); Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359, 363 (1956) ("neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act"); see also Reyes v. United States, 417 F.2d 916, 919 (9th Cir. 1969); Johnson v. United States, 404 F.2d 1069 (9th Cir. 1968); Wood v. United States, 405 F.2d 423 (9th Cir. 1968); Huerta v. United States, 322 F.2d 1 (9th Cir. 1963).

The Ninth Circuit has recognized the grand jury's unique history, secrecy, and role. See United States v. Navarro-Vargas, 408 F.3d 1184, 1188-1201 (9th Cir. 2005). Tracing the history of the grand jury from English common law, the U.S. Supreme Court has observed that grand jurors were not hampered by technical or evidentiary laws, and traditionally could return

indictments based not on evidence presented to them at all, but on their own knowledge of the facts. See Costello, 350 U.S. at 363. In light of this tradition, the Court held that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act," and that grand jury indictments could not be challenged based on the insufficiency or incompetence of the evidence. Id. Rather, "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." Id. at 409.

Here, Defendant suggests no grounds on which proceedings before the grand jury would warrant dismissal of the indictment, nor can he point to anything untoward that might have occurred before the grand jury that could possibly warrant dismissal. As such, his request for transcripts should be denied.

C. 18 U.S.C. § 545 IS NOT UNCONSTITUTIONALLY VAGUE

Defendant contends that the "contrary to law" language found in 18 U.S.C. § 545 is so vague as to render the statute unconstitutional. Defendant's contention is meritless.

A criminal statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. United States v. Batchelder, 442 U.S. 114, 123 (1979); United States v. Van Hawkins, 899 F.2d 852, 854 (9th Cir. 1990). The statute must define the prohibited actions and must establish the minimum guidelines to govern law enforcement. Kolender v. Lawson, 461 U.S. 352, 357-358 (1983).

The essential purpose of an indictment is to "give the defendant notice of the charge so that he can defend his case adequately.'" United States v. Neill, 166 F.3d 943, 947 (9th Cir. 1999) (quoting United States v. James, 980 F.2d 1314, 131 (9th Cir. 1992)). "[W]hile the accused must be afforded full protection, the guilty shall not escape through mere imperfections of pleading." Harmer v. United States, 285 U.S. 427, 432 (1932).

Here, the "contrary to the law" language is not vague. Convictions based on violating 18

U.S.C. § 545 and 19 U.S.C. § 1461 have consistently been upheld by the Ninth Circuit. United States v. Garcia-Paz, 282 F.3d 1212 (9th Cir. 2002); United States v. Davis, 597 F.2d 1237 (9th Cir. 1979); Current v. United States, 287 F.2d 268 (9th Cir. 1961). Therefore, Defendant's motion should be denied.

D. 18 U.S.C. § 545 IS NOT UNCONSTITUTIONAL

Defendant argues that the presence of the following language in 18 U.S.C. § 545 renders the entire statute constitutional: "Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section." He claims that the presence of such language in the statute renders the entire statute unconstitutional, requiring dismissal of the indictment.

Defendant's argument has no merit, as this language from section 545 appears nowhere in the indictment in this case. Furthermore, this language appears nowhere in current Ninth Circuit Model Criminal Jury Instruction 8.29 (2008), which generally governs section 545. Defendant cites utterly no authority for the proposition that the presence of an allegedly unconstitutional burden-shifting provision in a criminal statute that eases the government's burden of proof militates that the *entire statute is unconstitutional* and the remedy is dismissal of the indictment, as opposed to mere excision of the offending language. As the government has not included the allegedly offending language in the indictment, it need not be dismissed. The issue of whether *the jury should be so instructed* is an entirely different issue, but one that Defendant raises prematurely and in the wrong context.

The government does not concede at this time that this language is unconstitutional. In fact, the Comment to Ninth Circuit Model Criminal Jury Instruction 8.29 states that "[t]he statute also provides that proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section," and cites to the case of United States v. Salas-Camacho, 859 F.2d 788, 790 (9th Cir. 1988). In discussing this language in section 545, the Ninth Circuit noted in Salas-Camacho:

"An importer has an obligation to stop and declare items intended for entry into the United States. Courts have required, moreover, that an importer take the first opportunity to declare the goods in their possession." Id. at 790 (quotation marks and citations omitted). Again, however, this Court need not rule on this issue at this time, as Defendant's motion seeks an inappropriate remedy and is premature.

E. THE INDICTMENT IS NOT DEFECTIVE

Defendant argues that the indictment in this case is defective, and should be dismissed for three reasons. First, he claims that the indictment alleges the improper standard for *mens rea*, citing the case of Garcia-Paz, 282 F.3d at 1214. He claims that "the government must allege in the indictment and prove at trial beyond a reasonable doubt that Mr. Rendon-Lara knew his actions during the importation of the merchandise was contrary to law." Defendant ignores the fact that the Garcia-Paz court approved of *substantively the same language* in the indictment in that case. The Ninth Circuit observed:

> A plain reading of the indictment does not support the construction Garcia-Paz advances. The relevant portion of the third count of the indictment reads: "defendant IVAN Garcia-Paz, did knowingly import and bring into the United States certain merchandise, to wit, marijuana, contrary to law." The government explains that the phrase "to wit" did not speak to Garcia-Paz's knowledge, but rather was there to inform the jury what "merchandise" the government would prove was smuggled. Webster's New World Dictionary supports this argument by defining "to wit" as "that is to say; namely." Webster's New World Dictionary 1534 (Third College ed. 1988). Hence, from a purely textual and definitional analysis, Garcia-Paz's argument fails.

The indictment in the case declares, in pertinent part, that Defendant did "knowingly and intentionally import and bring into the United States from Mexico certain merchandise, to wit, approximately 102.85 kilograms (approximately 226.27 pounds) of iodine, contrary to law." Under Garcia-Paz, it is simply not defective. Prior to jury deliberations, this Court will assuredly provide detailed instructions to the jury concerning the required *mens rea* in this case.

Second, Defendant claims that the indictment fails to state an offense because the indictment supposedly alleges that Defendant violated 19 U.S.C. § 1461 by failing to "present for

inspection and declare" the iodine found in the vehicle, while Section 1461 states that the merchandise must be "unladen in the presence of and be inspected by a customs officer." Defendant's argument is meritless, as the Ninth Circuit has consistently held that section "1461 places upon the importer the obligation to stop and declare items intended for importation." United States v. Davis, 597 F.2d 1237, 1239 (9th Cir.1979); see also U.S. v. Salas-Camacho, 859 F.2d 788, 790 (9th Cir. 1988) ("An importer has an obligation to stop and declare items intended for entry into the United States."); United States v. Mirenda, 443 F.2d 1351, 1356-57 (9th Cir. 1971) (conviction upheld for "knowingly, with intent to defraud the United States, import(ing) or bring(ing) into the United States marihuana contrary to law . . .," in violation of 21 U.S.C. § 176a, despite fact that customs agents waved defendants' vehicle through two inspection posts without conducting an inspection).

Defendant's argument that the sole count of the indictment improperly charges two distinct offenses also is without merit. In the case Defendant cites, Olais-Castro v. United States, 416 F.2d 1155 (9th Cir. 1969), the Ninth Circuit held that "[t]he essential elements of an offense under the only relevant portion of the second paragraph of section 545 are: (1) defendant fraudulently or knowingly, (2) imported or brought into the United States, (3) any merchandise, (4) contrary to law." Id. at 1158. The implication of this text is clear: despite Defendant's claims, the relevant portion of section 545 *does not* improperly allege two distinct offenses; otherwise, the Ninth Circuit would not have approved of the jury instructions at issue.

Defendant's analogy to the case of United States v. Patel, 762 F.2d 784 (9th Cir. 1985), also fails. In that case, the defendant was, for whatever reason, only charged with "importation of coffee" in the indictment, not importing *and* bringing coffee to the United States. Id. at 787. Indeed, in Patel, the Ninth Circuit approvingly quoted the exact language from Olais-Castro quoted above. See id. at 790. Presumably, the lower court in Patel did not include the "bringing in" language in its jury instructions because *Patel hadn't been so charged*. It is unclear how Patel is at all relevant to the argument advanced by Defendant.

Defendant simply fails to appreciate a long-standing rule of criminal procedure: that an indictment can charge an element in the conjunctive and the government's proof can be in the disjunctive. United States v. Booth, 309 F.3d 566, 572 (9th Cir.2002) ("When a statute specifies two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count and proof of any one of those conjunctively charged acts may establish guilt.").

F. THE DESCRIPTION OF THE MERCHANDISE SHOULD NOT BE STRICKEN AS SURPLUSAGE

Defendant claims that the "to wit, approximately 102.85 kilograms (approximately 226.27 pounds) of iodine" language contained in the indictment is surplusage and must be stricken. Although the government concedes that the language is surplusage, there is nothing wrong *per se* with the inclusion of surplusage in a charging document; rather, the purpose of a motion to strike surplusage is to protect a defendant against prejudicial or inflammatory allegations that are neither relevant nor material to the charges. United States v. Ramirez, 710 F.2d 535, 544-45 (9th Cir. 1983). The language challenged is neither. It simply sets forth the nature of the merchandise at issue in the case, which is extremely relevant and material to the charges. Defendant does not pose any logical explanation for how this language would "confuse the nature of the actual offense and prejudice the jury," Defendant's Additional Motions at 30. Defendant's argument is meritless.

G. DEFENDANT'S STATEMENTS SHOULD NOT BE SUPPRESSED

Defendant moves for the suppression of Defendant's post-Miranda statement to agents, asserting that the statement was involuntary and that Defendant's Miranda waiver was not knowingly and voluntarily given. Defendant fails to show that the post-arrest waiver was not knowingly, voluntarily, and intelligently made. Defendant's motion to suppress statements should be denied.

After being placed under arrest, Defendant was questioned by Special Agents from U.S. Immigration and Customs Enforcement ("ICE"). Defendant was advised of his Miranda rights, which he acknowledged and waived, and then gave a statement. Defendant moves to suppress

statements and requests that the government prove that all statements were voluntarily made, and made after a knowing and intelligent Miranda waiver. Defendant contends that 18 U.S.C. § 3501 mandates an evidentiary hearing be held to determine whether Defendant's statements were voluntary.

1. Knowing, Intelligent, and Voluntary Miranda Waiver

A statement made in response to custodial interrogation is admissible under Miranda v. Arizona, 384 U.S. 437 (1966), and 18 U.S.C. § 3501 if a preponderance of the evidence indicates that the statement was made after an advisement of Miranda rights, and was not elicited by improper coercion. See Colorado v. Connelly, 479 U.S. 157, 167-70 (1986) (preponderance of evidence standard governs voluntariness and Miranda determinations; valid waiver of Miranda rights should not be found in the "absence of police overreaching").

A valid Miranda waiver depends on the totality of the circumstances, including the background, experience, and conduct of the defendant. North Carolina v. Butler, 441 U.S. 369, 374-75 (1979). To be knowing and intelligent, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986). The Government bears the burden of establishing the existence of a valid Miranda waiver. North Carolina v. Butler, 441 U.S. at 373. In assessing the validity of a defendant's Miranda waiver, this Courts should analyze the totality of the circumstances surrounding the interrogations. See Moran v. Burbine, 475 U.S. at 421. Factors commonly considered include: (1) the defendant's age (see United States v. Doe, 155 F.3d 1070, 1074-75 (9th Cir. 1998) (en banc) (valid waiver because the 17 year old defendant did not have trouble understanding questions, gave coherent answers, and did not ask officers to notify parents), (2) the defendant's familiarity with the criminal justice system (see United States v. Williams, 291 F.3d 1180, 1190 (9th Cir. 2002) (waiver valid in part because defendant was familiar with the criminal justice system from past encounters), (3) the explicitness of the Miranda waiver (see United States v. Bernard S., 795 F.2d 749, 753 n.4 (9th Cir. 1986) (a written Miranda

waiver is "strong evidence that the waiver is valid"); United States v. Amano, 229 F.3d 801, 805 (9th Cir. 2000) (waiver valid where Miranda rights were read to defendant twice and defendant signed a written waiver), and (4) the time lapse between the reading of the Miranda warnings and the interrogation or confession. See Guam v. Dela Pena, 72 F.3d 767, 769-70 (9th Cir. 1995) (valid waiver despite 15-hour delay between Miranda warnings and interview). Furthermore, if there are multiple interrogations, as occurred in this case, repeat Miranda warnings are generally not required unless an "appreciable time" elapses between interrogations. See United States v. Nordling, 804 F.2d 1466, 1471 (9th Cir. 1986).

Here, the agents scrupulously honored the letter and spirit of Miranda in carefully advising Defendant of his Miranda rights prior to any post-arrest custodial interrogation. Defendant agreed to waive his Miranda rights prior to questioning. Based on the totality of the circumstances, Defendant's statements should not be suppressed because his Miranda waiver was knowing, intelligent, and voluntary.

Defendant's claim that he "expressly, unequivocally and unambiguously told the agents he wanted an attorney," Defendant's Additional Motions at 32, is not belied by the transcript provided by defense counsel[1/] of the full Miranda reading, specifically as set forth at pages 6 and 7 of Exhibit C to Defendant's Additional Motions. In pertinent part, after Defendant's mention of an attorney, in addition to acknowleding his Miranda rights, Defendant was variously advised by agents that: (1) "Okay, so if you want an attorney we cannot go on, you cannot speak to us;" (2) "If you want to speak with an attorney and to have an attorney here, this is over;" and (3) "Your name and signature. Only if you are sure you wish to continue and if you want to talk." Exhibit C to Defendant's Additional Motions at 5-7. In response to this last advisement, Defendant replied, "Well, yes I wish to talk because I have nothing to hide. I mean, how I got it, what happened and all that, I have nothing to hide." Id. at 7.

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[1] The United States does not concede the accuracy of this translation and transcription and will provide its own to the Court, should an evidentiary hearing be ordered.

2. Defendant's Statements Were Voluntary

The inquiry into the voluntariness of statements is the same as the inquiry into the voluntariness of a waiver of Miranda rights. See Derrick v. Peterson, 924 F.2d 813, 820 (9th Cir. 1990). Courts look to the totality of the circumstances to determine whether the statements were "the product of free and deliberate choice rather than coercion or improper inducement." United States v. Doe, 155 F.3d 1070, 1074(9th Cir. 1998)(en banc).

A confession is involuntary if "coerced either by physical intimidation or psychological pressure." United States v. Crawford, 372 F.3d 1048, 1060 (9th Cir. 2004) (quoting United States v. Haswood, 350 F.3d 1024, 1027 (9th Cir. 2003)). In determining whether a defendant's confession was voluntary, "the question is 'whether the defendant's will was overborne at the time he confessed.'" Clark v. Murphy, 331 F.3d 1062, 1072 (9th Cir.), cert. denied, 540 U.S. 968 (2003) (quoting Haynes v. Washington, 373 U.S. 503, 513 (1963)). Psychological coercion invokes no per se rule. United States v. Miller, 984 F.2d 1028, 1030 (9th Cir. 1993). Therefore, the Court must "consider the totality of the circumstances involved and their effect upon the will of the defendant." Id. at 1031 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226-27 (1973)).

In determining the issue of voluntariness, this Court should consider the five factors under 18 U.S.C. § 3501(b). United States v. Andaverde, 64 F.3d 1305, 1311 (9th Cir. 1995). These five factors include: (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he or she was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he or she was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his or her right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. 18 U.S.C. § 3501(b). All five

statutory factors under 18 U.S.C. § 3501(b) need not be met to find the statements were voluntarily made. See Andaverde, 64 F.3d at 1313.

As discussed above, Defendant was read his Miranda rights pre-interview. After Defendant acknowledged his Miranda rights, a dialogue ensued between the ICE agents and Defendant, whereupon Defendant decided to make a statement without having an attorney present. Defendant clearly understood his Miranda rights and agreed to waive those rights. See United States v. Gamez, 301 F.3d 1138, 1144 (9th Cir. 2002). Defendant's statements were not the product of physical intimidation or psychological pressure of any kind by any government agent. There is no evidence that Defendant's will was overborne at the time of his statements. Consequently, Defendant's motion to suppress his statements as involuntarily given should be denied.

H. ANY CELLULAR TELEPHONES SHOULD NOT BE SUPPRESSED

Defendant claims that any cellular telephones recovered in this case should be suppressed because such searches were done without a warrant and without voluntary consent. Even assuming *arguendo* that Defendant did not consent to such searches, any such search is nonetheless proper as a border search, a valid exception to the warrant requirement. "Courts have long held that searches of closed containers and their contents can be conducted at the border without particularized suspicion under the Fourth Amendment." United States v. Arnold, --- F.3d ----, 2008 WL 2675794 (9th Cir. 2008). In Arnold, the Ninth Circuit held that "that reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border." Id. at *5. Furthermore, any such search was also valid as a search incident to arrest. See United States v. Robinson, 414 U.S. 218 (1973). Defendant's argument is meritless.

I. NO OPPOSITION TO LEAVE TO FILE FURTHER MOTIONS

The United States does not object to the granting of leave to allow Defendant to file further motions, as long as the order applies equally to both parties and additional motions are based on

newly discovered evidence or discovery provided by the United States subsequent to the instant motion at issue.

IV

CONCLUSION

For the foregoing reasons, the government respectfully requests that Defendant's motions, except where not opposed, be denied.

DATED: August 8, 2008.

Respectfully submitted,

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